

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

THOMAS KONTOGIANNIS,  
  
vs. Petitioner,  
  
UNITED STATES OF AMERICA,  
  
Respondent.

CASE NO. 07cr0423-LAB  
08cv1373-LAB  
12cv2265-LAB

**ORDER DENYING AS TIME-  
BARRED PETITION PURSUANT  
TO 28 U.S.C. § 2255**

On February 23, 2007, Petitioner Thomas Kontogiannis pleaded guilty to one count of violating 18 U.S.C. § 1957. The Court entered judgment on May 19, 2008, sentencing him to 97 months' imprisonment, three years' supervised release, and a fine of \$1,050,000. On July 24, 2008, a petition pursuant to 28 U.S.C. § 2255 was filed on Kontogiannis' behalf. After the Court set a briefing schedule, Kontogiannis filed a motion to withdraw the petition. He represented that, although he had signed a draft of the petition, it was filed by someone else without his authorization. The Court therefore on August 28, 2008 granted him leave to withdraw the petition "without prejudice to refile at a later date, in accordance with applicable rules." (Order of Aug. 28, 2008 (Docket no. 90) at 1:26–2:2. See *also* Motion to Withdraw (Docket no. 89) at 4:10–14 (requesting permission to withdraw the motion "without prejudice to filing such a motion at some later date and in accordance with the applicable rules").)

1           Kontogiannis waited over four years before he filed a new § 2255 petition, bringing  
 2 the same claims as in his earlier petition while giving a new and conflicting explanation for  
 3 withdrawing that petition. (Docket no. 98.) Earlier he represented that someone else had filed  
 4 the petition for him without his permission, and upon discovering this, he sought to have it  
 5 withdrawn so that he could look it over. He now maintains that he indeed filed the earlier  
 6 petition, but withdrew it because his attorneys persuaded him to do so for tactical reasons.  
 7 (*Id.* at 8, 9.)<sup>1</sup> He also represents that “No further motions were filed in this case,” (*id.* at 9),  
 8 although the docket reflects that a post-trial motion to modify the interest on the fine was  
 9 filed and adjudicated. The last docket entry before the filing of the current petition was April  
 10 28, 2009.

11           Had the Court been presented with Kontogiannis’ new explanation instead of the one  
 12 he gave at the time, it would have denied his request to withdraw his earlier petition and  
 13 would have required Kontogiannis to either pursue his claims or drop them. But the Court  
 14 need not determine whether Kontogiannis first or second explanation was false (or whether  
 15 both were), because it is clear his petition is time-barred. Petitions filed pursuant to § 2255  
 16 are subject to a one-year statute of limitations running from the latest of four dates.  
 17 § 2255(f). Here, the time began to run for Kontogiannis on May 19, 2008, when judgment  
 18 was entered. Furthermore, this petition raises the same claims as the earlier one. (Docket  
 19 no. 98 at 8 “Petitioner now rehashes the claims raised in his prior petition.”) so he obviously  
 20 knew and could have raised these same claims four years ago. The one-year limitations  
 21 period thus expired over three years ago, and relief under § 2255 is unavailable.

22           Kontogiannis repeatedly invokes the phrase “actual innocence,” and if he had any  
 23 realistic chance at showing he was actually innocent, he might be able to avoid the time bar.  
 24 A petitioner’s colorable claim of actual innocence permits him to proceed with a petition  
 25 under 28 U.S.C. § 2241, an “escape hatch” to § 2255’s otherwise applicable time limitations.  
 26 See *Harrison v Ollison*, 519 F.3d 952, 958–59 (9<sup>th</sup> Cir. 2008). But the “escape hatch”

---

27  
 28           <sup>1</sup> Although the petition’s pages are numbered, the numbering restarts midway through  
 the petition. For the sake of clarity, the Court will refer to the docketed page numbers which  
 can be found in the Electronic Case Filing header at the top of the document.

1 provision is only available where a petitioner has not had an “unobstructed procedural shot”  
2 at presenting his claim of actual innocence. *Id.* Here, Kontogiannis has had that shot, as  
3 illustrated by the fact that he in fact did claim actual innocence in his initial petition, of which  
4 he admits the current petition is merely a “rehash.”

5 Kontogiannis also cites the Court’s order of August 28, 2008, as if it extended the  
6 limitations period. (See Docket no. 98 at 2 (“Court granted motion to withdraw Section 2255  
7 without prejudice to refiling. The petitioner now refiles.”)) It did not. The Court’s order did not  
8 purport to extend, toll, or suspend the running of the limitations period in § 2255(f); rather,  
9 it specified that he could refile “in accordance with applicable rules.” In other words, because  
10 the initial petition was dismissed without prejudice, if Kontogiannis filed another § 2255  
11 petition, it would not be considered a “second or successive” petition. See *Green v. White*, 223  
12 F.3d 1001, 1002 n.1 (9<sup>th</sup> Cir. 2000) (explaining that, if initial petition is adjudicated on the  
13 merits or dismissed with prejudice, later petition will generally be considered “second or  
14 successive”). But if Kontogiannis wanted to file another petition, he still had to comply with  
15 applicable rules. Those “applicable rules” include the one-year limitations period.

16 Other than the arguments discussed, Kontogiannis makes no effort to show why the  
17 limitations period should be tolled or extended in any way.

18 Finally, although not necessary to the Court’s decision, it is apparent Kontogiannis’  
19 “actual innocence” claim is frivolous. He essentially argues that he would have been  
20 acquitted at trial because the amount of money fraudulently transferred was \$525,000,  
21 instead of over \$1 million which (he claims) was alleged in the information.<sup>2</sup> (See Docket no.  
22 98 at 10–11.) In fact, the information merely alleges that the amount was “greater than  
23 \$10,000.” See also 18 U.S.C. § 1957(a) (specifying that the value be “greater than  
24 \$10,000”). Rather than the pleading allegations in the complaint, what Kontogiannis is  
25 actually referring to are Guideline provisions that he stipulated to in his plea agreement.  
26 These have no bearing on whether he was guilty of the offense, but relate only to what the

27 ///

---

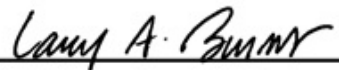
28 <sup>2</sup> Kontogiannis waived indictment.

1 proper sentence was. Based on his own admission, he was guilty, and there is no foundation  
2 for any "actual innocence" argument.

3 The petition is **DENIED** and a certificate of appealability is also **DENIED**.

4  
5 **IT IS SO ORDERED.**

6 DATED: September 18, 2012

7   
8 **HONORABLE LARRY ALAN BURNS**  
9 United States District Judge